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### Leaving the Ballpark

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# THE JOURNAL OF APPELLATE PRACTICE AND PROCESS

## FOREWORD

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### LEAVING THE BALLPARK

Occasionally, a court will slip out of its stoic, formal demeanor and make a reference in a published opinion that will bring a smile to the reader. In authoring the lead opinion in *City of Chicago v. Morales*,<sup>1</sup> Justice Stevens spoke eloquently, at least to a baseball fan, in describing the liberty interests infringed upon by a city ordinance designed to address gang-related criminal activity within Chicago. He wrote:

It matters not whether the reason that a gang member and his father, for example, might loiter near Wrigley Field is to rob an unsuspecting fan or just to get a glimpse of Sammy Sosa leaving the ballpark; in either event, if their purpose is not apparent to a nearby police officer, she may—indeed, she “shall”—order them to disperse.<sup>2</sup>

The point here is not to reconsider the merits of ordinance or the various opinions addressing its constitutionality, but merely to note the refreshing language Justice Stevens used when he referred to Sammy Sosa “leaving the ballpark.” A non-fan might assume that the Justice is speculating that the gang member and his father might be waiting to catch a glimpse of the first major leaguer to hit sixty home runs or more in two—much less consecutive—seasons.<sup>3</sup> Perhaps they will ask for an autograph; perhaps simply

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1. 119 S. Ct. 1849 (1999).

2. *Id.* at 1861.

3. Mark McGwire led the Major Leagues in home runs in 1998 with 70, breaking Babe

catching Sammy's contagious smile will cause the youthful gang member to reconsider personal choices that led to gang affiliation.

But for the fan, Sosa's act of "leaving the ballpark" has more to do with his work at the plate than his trip home at the end of the workday. To the well-versed fan, when Sosa "leaves the ballpark," he sends a message to the opposing pitcher by slamming the ball beyond the reach of the opposing outfielders and over one of the many fences that form parameters for playing areas in major league ballparks.

Justice Stevens' choice of words reminds us, as lawyers, of the need to understand the context in which language is used. "Leaving the ballpark" is susceptible to different interpretations and is, indeed, a term of art for the baseball fan and commentator. Sammy Sosa does leave the ballpark when he concludes a day's work, of course, but some of his home runs—like the 61st he hit this afternoon against the Milwaukee Brewers—also result in the baseball "leaving the park." The 61st was recovered well outside the park in a residential neighborhood;<sup>4</sup> he truly left the ballpark today.

Not that Justice Stevens was alone in his appreciation for allusion in his drafting of the opinion in *City of Chicago v. Morales*. Justice Scalia, in dissent, resurrected the visage of Officer Krupke from *West Side Story* in his characterization of confrontations between the police and gang members on city streets.<sup>5</sup> Scalia was untroubled by the delegation of authority to the beat cop to exercise discretion under the ordinance to disperse the "criminal element" before that element can translate evil intent into criminal acts.<sup>6</sup> His reference is refreshing, but the

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Ruth's 154 game record of 60 and Roger Maris's 61, achieved in the expanded, 162 game season. Ruth and Maris both played for the dreaded New York Yankees at the time of their achievements. It seems highly unlikely that McGwire will not join Sosa with 60-plus home runs again this season, but at the time of this writing, only Sosa has left the ballpark more than 60 times in 1999.

4. The ball was estimated to have traveled 495 feet by the device employed by WGN sponsor Southwest Airlines to measure home run distances. Former Cy Young Award winner and WGN announcer Steve Stone disagreed with the estimate and the video subsequently shown suggests that the ball did, in fact, travel much farther outside the ballpark.

5. 119 S. Ct. at 1871 (Scalia, J., dissenting). The Justice expressed an apology for "taking creative license" with the works of *West Side Story*'s creators and their obvious creative genius. *Id.* at n.5.

6. *Id.* at 1867. Moreover, Justice Scalia, went so far as to criticize Justice Stevens' suggestion that under the protections afforded by the federal constitution, the subjects of police

choreographed violence of the now 40-year-old retelling of *Romeo and Juliet* seems quite removed from the threat of violence associated with urban gang activity that led to the Chicago City Council's enactment of the ordinance in 1992.

In the ordinance, Chicago attempted a fine legislative balancing act that would accommodate due process values while authorizing police to take aggressive, preemptive measures to deal with street crime. The City failed to achieve that balance, but did draw the votes of three Justices of the United States Supreme Court in *Morales*. In baseball, three hits in nine at-bats would meet the standard for excellence in hitting, of course. Three for nine in the Supreme Court probably also means excellence, but you do not win. Sammy Sosa left the ballpark over sixty times this season and set a record in the process, but the Cubs will still not make the Series this year.<sup>7</sup>

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## ERRATA

*The Journal* apologizes to the Honorable Jon O. Newman, Circuit Judge for the United States Court of Appeals for the Second Circuit, for the misspelling of his name twice in our first issue. The error was committed in the editing process, and while we achieved consistency in the misspelling, it is a consistency I would not have wished upon Judge Newman or our readers.

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discretion might simply be fans entitled to await their hero. To this suggestion, Justice Scalia observed caustically that, as opposed to the protections afforded speech and the practice of religion, "[r]emaining in one place is *not* so protected." *Id.* at 1877. Thus, the citizens of Chicago could decide to prevent fans from congregating on the street outside Wrigley field to catch Sammy leaving the ballpark.

7. The Cubs last won the World Series in 1908 and lost to the Detroit Tigers in the 1945 Series. Since '45, the Cubs have made three playoff appearances likely most attributable to the proliferation of playoffs in major league baseball, losing to the San Diego Padres in the National League Championship Series in 1984 and to the San Francisco Giants in 1989. Last year, the Cubs made the playoffs during Sosa's first 60-plus home run year, when his 66 homers finished second to the 70 slammed by Mark McGwire of the St. Louis Cardinals.

## REQUEST FOR SUBMISSIONS

The Journal is actively seeking essays and articles on issues related to the appellate process from judges, practitioners, and academics. We hope to focus on the application of technology to appellate practice in our fourth issue, to be published in the summer of 2000, and we are interested in submissions that address current and anticipated technological initiatives and, particularly, observations about how technology may challenge traditional process and decisionmaking.

We are also particularly interested in:

- the treatment of substantive issues on appeal, such as Professor Spiegelman's article in our first issue on the role of prosecutorial intent in assessing claims of misconduct during closing argument;
- discussions of ethical issues confronting appellate courts and practitioners;
- historical essays exploring the role of appellate courts or individual judges; and
- the exploration of general trends in appellate decisionmaking, such as the recent focus on state constitutional guarantees, or the shifting approaches toward statutory interpretation or deferential decisionmaking principles.

Finally, we are always interested in short Developments pieces on either new practices or procedural devices being used in appellate court systems or on strategies for enhancing professional skills.

JTS, Editor  
Little Rock  
September 19, 1999